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I. INTRODUCTION

The Fourteenth Amendment to the United States Constitution precludes states from denying equal protection of the laws, and state constitutions contain analogous protections. In several cases, plaintiffs have challenged state same-sex marriage bans, arguing that such statutes violate state or federal equal protection guarantees.

Some state supreme courts have held that the state's same-sex marriage ban violates the state constitution's equal protection guarantees, whereas other supreme courts have reached the opposite conclusion. This lack of uniformity is unsurprising, both because the language in one state constitution might differ from that of another and because, even where the

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language is the same, the jurisprudence in the respective states fleshing out the depth and breadth of the guarantees might differ. What seems more surprising is that courts cannot even agree about whether same-sex marriage bans employ a sex-based classification. Yet, if courts are having difficulty in determining that, then there are important implications both for analyses regarding the constitutionality of same-sex marriage bans in particular and for any analyses of equal protection guarantees more generally.

Part II of this Article discusses federal equal protection jurisprudence, focusing on the indicia for the differing tiers of scrutiny. Part III discusses some state supreme court attempts to analyze whether same-sex marriage bans violate equal protection guarantees, explaining how some of the adopted approaches are incompatible with current federal equal protection doctrine. The Article concludes that unless the United States Supreme Court makes clear how some of these approaches involve basic misunderstandings of current doctrine, equal protection jurisprudence will either become even more inconsistent or, even worse, may coalesce around a doctrine rejected almost half a century ago.

II. FEDERAL PROTECTIONS

Equal protection guarantees are not designed to impose unreasonable limitations on the ability of legislators to craft solutions to promote the public welfare but merely to prevent states from arbitrarily imposing burdens on disfavored individuals. In some cases, it is unclear whether the state is invidiously discriminating or is simply promoting the public good as a general matter, which almost invariably involves a distribution of burdens and benefits to which some will object. To help courts assess in a particular case whether a classification is legitimate or, instead, offends constitutional guarantees, the Court has offered some helpful guidelines.

A. The Tiers

The United States Supreme Court has long recognized that some "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[1] When such factors are used, there is a presumption that the classification is not promoting a legitimate state purpose and should be struck down.[2]

Classifications that likely reflect prejudice are exactly the sorts that are less likely to be rectified through the usual legislative processes. The Court

1. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
2. *See id.*

has suggested that where "such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."[3] Thus, in part because certain classifications are likely to be the product of animus rather than a desire to promote legitimate state objectives, and in part because the normal correction mechanism within the political process may not operate properly when these groups are involved, the Court will view certain classifications "with skepticism, if not a jaundiced eye."[4]

To help courts determine whether classifications should be examined very closely or instead with greater deference, the Court has developed a system employing differing levels of scrutiny for three different kinds of classes: suspect classes, quasi-suspect classes, and a catch-all category that includes the rest.[5] Suspect classifications are rarely upheld,[6] whereas classifications falling into the catch-all category are rarely struck down.[7]

Classifications that are suspect will be examined with the closest scrutiny—a statute employing such a classification will be upheld only if it is narrowly tailored to promote a compelling state interest.[8] Classifications that are quasi-suspect will be subjected to somewhat less exacting scrutiny—a statute employing such a classification will be upheld only if it is substantially related to the promotion of an important state interest.[9] Finally, the remaining classification will be examined with much more forgiving scrutiny—a statute examined under rational basis review will be upheld as long as the classification is rationally related to the promotion of a legitimate state interest.[10]

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3. *Id.*

4. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 873 (1994).

5. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (describing the three equal protection tests: "'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny").

6. *See* Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 310 (2001) ("Where the Court sees certain touchstones of constitutional concern such as a suspect classification or the violation of a fundamental right, the government almost invariably loses . . . .").

7. *See* Michael Anthony Lawrence, *The Potentially Expansive Reach of* McDonald v. Chicago*: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 151 ("Under this standard of review the great majority of government actions are heavily presumed as valid and are almost always upheld . . . ."), http://www.cardozolawreview.com/content/denovo/lawrence_2010_139.pdf.

8. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

9. Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

10. Romer v. Evans, 517 U.S. 620, 631 (1996) ("if a law neither burdens a fundamental right nor

B. *The Indicia of Suspectness*

A classification will be treated as suspect or quasi-suspect under certain conditions. The classification must involve a group that has certain indicia: it must be "discrete and insular";[11] members of the group must have a disability over which they do not have control;[12] the defining characteristic of the group must not bear a rational relationship to a legitimate state purpose;[13] and the group must have "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[14] Further, group membership must be stigmatized by society and thus, for example, members cannot be expected to be able to secure equal treatment through the political process.[15] Where a group has those indicia, it will be designated as a suspect or quasi-suspect class.[16]

When a group or class has the relevant indicia, the Court will subject the *classification* to increased scrutiny.[17] For example, once the Court recognized that statutes targeting women should be subjected to heightened scrutiny, the Court started subjecting statutes targeting men or women for adverse treatment to close scrutiny. Then, the Court suggested that expressly classifying on certain bases would itself be enough to trigger heightened or strict scrutiny, *even without evidence of "targeting" members of the class for adverse treatment.*[18]

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targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"). One of the most forgiving applications of the rational basis text was offered in *Williamson v. Lee Optical*, 348 U.S. 483 (1955). *See id.* at 487–88 ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

11. *See* Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)) (internal quotation marks omitted).

12. *See* Parham v. Hughes, 441 U.S. 347, 353 (1979).

13. *See* Weber v. Aetna Cas., 406 U.S. 164, 172 (1972).

14. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

15. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

16. *But see infra* notes 26–27 and accompanying text (discussing whether the Court's current reluctance to expand the list of suspect or quasi-suspect classes indicates an unwillingness on the part of the Court to apply the existing indicia to other classes).

17. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny"); Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

18. *Cf., e.g.*, Mark Strasser, *Interpretations of* Loving *in* Lawrence, Baker, *and* Goodridge*: On Equal Protection and the Tiers of Scrutiny*, 13 WIDENER L.J. 859, 870 (2004) ("Express classifications on the basis of race will trigger strict scrutiny even where there is no malicious purpose behind the classification.").

The Court has offered examples of suspect status—race,[19] religion,[20] nationality,[21] and alienage[22]—and examples of quasi-suspect status—gender[23] and illegitimacy.[24] While members of the Court have sometimes suggested that other classes, "not now classified as 'suspect' . . . are unfairly burdened by invidious discrimination unrelated to the individual worth of their members,"[25] the Court has been reluctant to recognize new suspect or quasi-suspect classifications.[26]

This reluctance needs further examination. It might mean, for example, that the Court is unwilling to add new indicia to the list or to relax the degree to which a group must have the relevant indicia when another class seeks to be recognized as suspect or quasi-suspect. Or, it might mean that the Court is unwilling to recognize a new class as suspect or quasi-suspect even if the group has the indicia to the same extent as the existing classes. The former view might be understandable if, for example, great difficulties would be created were the implicit standards changed (for example, because relaxing the standard would somehow open up the floodgates to a whole host of classes no less deserving of special solicitude).[27] However, the latter view seems much less justifiable because it suggests that suspect and quasi-

19. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 746 (2007) ("Government action dividing us by race is inherently suspect . . . .").

20. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (describing religion as an "inherently suspect" classification).

21. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting) (describing the "highly suspect character of classifications based on . . . nationality").

22. Graham v. Richardson, 403 U.S. 365, 371–72 (1971) ("the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny").

23. Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

24. Trimble v. Gordon, 430 U.S. 762, 767 (1977) (indicating that illegitimacy is subjected to intermediate scrutiny).

25. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).

26. Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 238–39 (1997) ("The Court, perhaps in response to the perception that its assortment of suspect and quasi-suspect classes is irrational, has displayed a reluctance to create any new suspect categories.").

27. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985) ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.").

suspect status are not being decided on the merits but, instead, in light of other criteria. It would be most ironic if a particular group was not given protected status because some on the Court believed that stigmatizing a group historically subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities was nonetheless somehow permissible and appropriate.[28]

C. *Threshold Levels*

One difficulty posed by the Court's "indicia" approach is its utter indeterminacy. The Court has never made sufficiently clear whether a class must have all or merely most of the indicia, whether certain indicia are more important than others, or the extent to which particular indicia must be met.[29] By failing to explain the degree to which the differing indicia must be met, the Court makes it more difficult for lower courts to make reasoned assessments regarding which additional classes, if any, should be recognized as triggering a higher level of scrutiny. Basically, lower courts might adopt one of two different approaches: (1) they might simply refuse to recognize any new classes, instead waiting for the Supreme Court to do so,[30] or (2) they might examine those classes that have already been recognized as triggering increased scrutiny and try to discern the degree to which the

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28. *Cf.* Daniel Gordon, Comment, *Symptoms for Scalia and Texas: Gay Rights and American Nationalism*, 35 GOLDEN GATE U. L. REV. 111, 122–23 (2005) ("Justice Scalia's dissent . . . evidenced a widespread, deep, and enduring animus toward gays and lesbians."); *see also* Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting) ("But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful . . . ."); Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.").

29. For one interpretation of the Supreme Court's jurisprudence in this area, see *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 426 (Conn. 2008):

> The United States Supreme Court, however, consistently has identified two factors that must be met, for purposes of the federal constitution, if a group is to be accorded such status. These two required factors are: (1) the group has suffered a history of invidious discrimination [citing United States v. Virginia, 518 U.S. 515, 531–32 (1996)] . . . and (2) the characteristics that distinguish the group's members bear "no relation to [their] ability to perform or contribute to society." [citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion)] . . . The United States Supreme Court also has cited two other considerations that, in a given case, may be relevant in determining whether statutory provisions pertaining to a particular group are subject to heightened scrutiny. These two additional considerations are: (1) the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control [citing Lyng v. Castillo, 477 U.S. 635, 638 (1986)] . . . and (2) the group is "a minority or politically powerless." [citing Bowen v. Gilliard, 483 U.S. 587, 602 (1987)].

30. *Cf.* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006) (treating orientation as non-suspect after noting that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes").

existing indicia must be possessed in light of the degree to which the recognized classes had those indicia.[31]

Consider, for example, the degree to which it is necessary that individuals in the class be unable to change the characteristic that is the basis for the classification. Race is very difficult—if not impossible—to change,[32] whereas the same cannot be said of religion.[33] The same point might be noted when contrasting ancestry with alienage—one cannot change who one's ancestors were but one can change one's alienage status, for example, by becoming a United States citizen.[34] So, too, it is difficult—if not impossible—to change one's sex,[35] whereas one's illegitimacy status can be changed much more readily, assuming that one's parents will cooperate.[36]

Arguably, sexual orientation should be recognized as a classification triggering heightened scrutiny.[37] However, the United States Supreme Court has heard cases involving members of the lesbian, gay, bisexual, and transgender ("LGBT") community and has never recognized that orientation triggers intermediate or strict scrutiny.[38]

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31. *See infra* notes 65–71 and accompanying text (discussing the Connecticut Supreme Court's analysis of whether orientation is a classification triggering heightened scrutiny).

32. Historically, legislatures defined race in different ways. Some states determined race by going back three generations, some went back four, and some employed a one-drop rule. *See* Paul Finkelman, *The Color Of Law*, 87 NW. U. L. REV. 937, 955 n.96 (1993) (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992)). Arguably, it was possible for some individuals to change their (legal) race either by lobbying the legislature or by moving to another state with a different definition of who belonged to which race.

33. Indeed, one's freedom to change one's religion is itself protected. *See* 22 U.S.C.A. § 6402(13) (2006) (discussing internationally recognized rights to religious freedom including the right to change one's religion).

34. *See* Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 47 (2009) (noting that individuals can change their alienage status).

35. Sex reassignment surgery might be understood as making one's body in accord with one's sex rather than as changing one's sex. *See* Amanda S. Eno, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765, 771 (2008) ("Some transsexual individuals seek medical treatment to correct their physical body. Transition is the process by which individuals go through hormone therapy and sex reassignment to change themselves to align with their gender identity.").

36. *See, e.g.*, Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 60 MERCER L. REV. 417, 429 (2008) ("The Georgia General Assembly added a provision in 2005 that allows the parents of a child born out of wedlock to engage in a 'voluntary legitimation' of the relationship between the father and the child. Under O.C.G.A. § 19-7-22(g)(2), the mother and father of a child born out of wedlock can legitimate the father–child relationship if both parents sign a voluntary acknowledgement of paternity that also includes an acknowledgement of legitimation.").

37. *See infra* notes 65–71 and accompanying text.

38. Justice Brennan suggested that orientation should trigger closer scrutiny. He explained in *Rowland v. Mad River Local School District*, 470 U.S. 1009 (1985):

[H]omosexuals constitute a significant and insular minority of this country's population.

In *Bowers v. Hardwick*,[39] for example, the Court upheld a Georgia law making consensual sodomy a crime. The Court restricted its analysis to due process guarantees[40] and did not even address equal protection. Nonetheless, there is reason to think that the Court would have been unwilling to find that orientation triggered heightened scrutiny[41] and, indeed, some read *Bowers* as endorsing homophobia.[42]

Even when reaching a more favorable result for the LGBT community, the Court did not suggest that orientation was a protected classification. In *Romer v. Evans*,[43] the Court addressed the constitutionality of Colorado's Amendment 2, which read:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[44]

The *Romer* Court did not expressly address whether sexual orientation constitutes a suspect or quasi-suspect class, instead suggesting that this

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> Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than . . . rationality." [citing Plyler v. Does, 457 U.S. 202, 216 n.14 (1982)]. State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.

Id. at 1014 (Brennan, J., dissenting).

39. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

40. *Bowers* only addressed due process guarantees. *See id.* at 196 n.8 ("Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.").

41. *See id.* at 203 n.2 (Blackmun, J., dissenting) (mentioning a way to avoid "the more controversial question whether homosexuals are a suspect class").

42. *See* Joseph J. Wardenski, *A Minor Exception?: The Impact of* Lawrence v. Texas *on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1394 (2005) (discussing "*Bowers*, a prominent symbol of legally-sanctioned homophobia"); *see also* Watkins v. U.S. Army, 837 F.2d 1428, 1453 (9th Cir. 1988) (Reinhardt, J., dissenting) ("The anti-homosexual thrust of *Hardwick*, and the Court's willingness to condone anti-homosexual animus in the actions of the government, are clear."), *superseded by* 847 F.2d 1329 (9th Cir. 1988), *withdrawn on reh'g by* 875 F.2d 699 (9th Cir. 1989). *But see* Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997) ("It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation.").

43. 517 U.S. 620 (1996).

44. *Id.* at 624.

amendment was unconstitutional even on rational basis review.[45] The Court likened what was before it[46] to what had been before the Court in *Department of Agriculture v. Moreno*,[47] in which the Court had struck down legislation targeting a particular class (hippies) on rational basis grounds.[48] The *Moreno* Court had noted that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[49] Basically, the *Romer* Court was suggesting that the passage of Amendment 2 was motivated by animus and, thus, had to be struck down.[50]

Two different points might be made about the *Romer* Court's analysis. First, there was no need for the Court to reach whether orientation was a suspect or quasi-suspect classification if the law at issue could not even pass rational basis review. The Court noted that "*even* in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."[51] Thus, because the statute could not even pass that low level of review, there was no need to reach the question of whether the statute at issue would pass a more demanding test.

A different point is sometimes made about *Romer*'s citation of *Moreno*.[52] Justice O'Connor has suggested that the Court has unofficially recognized two different tiers within the catch-all category subject to rational basis scrutiny.[53] Economic legislation triggers the least demanding

45. *Id.* at 632 ("Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.")

46. *See id.* at 634–35.

47. 413 U.S. 528 (1973).

48. *Id.* at 534 ("The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

49. *Id.*

50. *See Romer*, 517 U.S. at 634 ("laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

51. *Id.* at 632 (emphasis added).

52. *See supra* notes 46–49 and accompanying text.

53. *See* Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring) ("We have consistently held, however, that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." (alteration in original) (citations omitted)).

review because it can most readily be rectified by normal political processes.[54] However, when a law targets "a politically unpopular group, . . . [the Court applies] a more searching form of rational basis review . . . ."[55] It may be that the Court has implicitly decided not to recognize any new suspect or quasi-suspect classes but will instead recognize gradations within the category subjected to rational basis scrutiny.[56]

Lawrence v. Texas,[57] the case in which the Court overruled *Bowers*, does not cast much light on the level of scrutiny triggered by classifications on the basis of sexual orientation. First, the Court struck down the Texas law criminalizing same-sex sodomy on due process grounds,[58] although the Court did suggest that Texas's statute was also constitutionally suspect on equal protection grounds.[59] Once again, because the classification at issue was unconstitutional in any event, it was not necessary to address whether classifying on the basis of orientation should raise the level of scrutiny either up to the intermediate scrutiny associated with gender or to the heightened rational basis scrutiny discussed by Justice O'Connor in her *Lawrence* concurrence.[60] Thus, the Court simply has not offered an analysis of the appropriate level of scrutiny for classifications on the basis of orientation in light of the relevant indicia, instead leaving that task to others.

III. STATE COURTS AND SUSPECT CONSTITUTIONAL CLASSIFICATIONS

When state supreme courts have analyzed the constitutionality of local same-sex marriage bans on equal protection grounds, they often address two distinct issues: whether orientation is a protected classification under the state constitution[61] and whether same-sex marriage bans classify on the basis of sex.[62] The analyses of the latter are rather surprising if only because they

54. *See id.* at 579–80 ("Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" (quoting City of Cleburne v. Cleburne Living Ctr, 473 U.S. 432, 440 (1985))).

55. *Id.* at 580.

56. *But see id.* at 601 (Scalia, J., dissenting) ("Justice O'Connor simply decrees application of 'a more searching form of rational basis review' to the Texas statute. . . . The cases she cites do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue.").

57. 539 U.S. 558.

58. *Id.* at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

59. *See id.* at 574–75 ("[C]ounsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument . . . .").

60. *Id.* at 580 (O'Connor, J., concurring).

61. *See infra* Part III.A.

62. *See infra* Part III.B.

are so radically different that they do not seem to be interpreting the same guarantees. This utter lack of consensus about how to apply the standard equal protection jurisprudence may bode poorly for future analyses implicating equal protection guarantees regardless of which group is claiming to be unconstitutionally targeted by the classification at issue.

A. Orientation as a Protected Classification Under the State Constitution

Several state courts have addressed whether sexual orientation is a classification triggering strict or heightened review under their respective state constitutions. When doing so, they consider the indicia articulated by the Supreme Court, although that of course does not end the analysis. As should not be surprising, some state supreme courts have concluded that orientation is not a classification triggering heightened scrutiny,[63] whereas others have reached the opposite conclusion.[64]

Consider the analysis offered by the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health*.[65] The court discussed each of the enumerated criteria, noting that orientation has the relevant indicia when considered in light of those classifications already recognized as meeting the articulated standards. The court explained:

> Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society. The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.[66]

The court rejected that members of the LGBT community were too politically powerful to be considered a class worthy of protection, noting that sex was declared a quasi-suspect classification at a time when women as a class were considered more powerful than members of the LGBT

63. *See* Conaway v. Deane, 932 A.2d 571, 629 (Md. 2007) ("Because Family Law § 2-201 does not discriminate on the basis of sex, burden significantly a fundamental right, or otherwise draw a classification based on suspect or quasi-suspect criteria, rational basis review is the correct standard of constitutional review under which we consider the Maryland marriage statute.").

64. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) ("for the same reasons that classifications predicated on gender are considered quasi-suspect for purposes of the equal protection provisions of the United States constitution, sexual orientation constitutes a quasi-suspect classification for purposes of the equal protection provisions of the state constitution").

65. 957 A.2d 407 (Conn. 2008).

66. *Id.* at 432.

community are today.[67] As the court explained, given that orientation meets the other indicia and that members of the LGBT community are not as powerful as were members of another group when that classification was held to trigger heightened scrutiny, it would be at the very least unfair not to recognize that orientation triggers heightened scrutiny as well.[68]

The court considered whether orientation is an immutable characteristic, noting that different courts have reached different conclusions about whether orientation is in fact immutable,[69] but also noting that there is no requirement in the jurisprudence that the characteristic be immutable.[70] One need only consider some of the classifications that have been recognized as triggering heightened or strict scrutiny to see that immutability is not required.[71]

The Washington Supreme Court reached very different conclusions when trying to decide whether orientation triggered heightened scrutiny.[72] For example, the court reasoned that because some protective legislation had been passed, it was obvious that the LGBT community was not completely powerless.[73] Yet presumably, if the presence of express protective legislation is indicative of power, then the presence of express protection within the United States Constitution would certainly seem to be indicative of power and would obviate the need to find additional protections within Fourteenth Amendment guarantees. Yet, were that the relevant test, one

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67. *Id.* at 452–53 ("With respect to the comparative political power of gay persons, they presently have no greater political power—in fact, they undoubtedly have a good deal less such influence—than women did in 1973, when the United States Supreme Court, in *Frontiero*, held that women are entitled to heightened judicial protection." (citing Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion))); *see also* Varnum v. Brien, 763 N.W.2d 862, 895 (Iowa 2009) ("We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation. Gays and lesbians certainly possess no more political power than women enjoyed four decades ago when the Supreme Court began subjecting gender-based legislation to closer scrutiny. Additionally, gay and lesbian people are, as a class, currently no more powerful than women or members of some racial minorities.").

68. *Kerrigan*, 957 A.2d at 456 ("Because gay persons, like women, fully satisfy the first three criteria of the suspectness inquiry, it would be manifestly unfair to the plaintiffs, and to gay persons generally, to ignore or dismiss the analysis and result of *Frontiero*, which correctly concluded that women were not so politically powerful as to obviate the need for heightened judicial scrutiny of gender-based classifications.").

69. *Id.* at 436–37.

70. *Id.* at 437 ("Although we do not doubt that sexual orientation—heterosexual or homosexual—is highly resistant to change, it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable, because, even if it is not, the plaintiffs nonetheless have established that they fully satisfy this consideration.").

71. *See supra* notes 32–36 and accompanying text.

72. *See* Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006).

73. *Id.* at 974–75 ("The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.").

would have assumed that sex could not be a protected classification because, after all, the Nineteenth Amendment to the United States Constitution affords express protection on the basis of sex.[74] So, too, one might have assumed that race would not be a suspect classification because the Fifteenth Amendment to the United States Constitution affords express protection on the basis of race,[75] which would allegedly establish that racial minorities were and are not powerless.

The difficulty with the Washington court's approach was not that it examined whether members of the LGBT community were powerful but that the threshold degree of powerlessness used to disqualify the class as being suspect or quasi-suspect was artificially low and might have been used to disqualify classes that had already been recognized as meeting the relevant standard. Instead, the Washington court should have considered the degree of powerlessness of the recognized classes at the time of recognition as establishing the relevant baseline.[76] Or, perhaps, the court should have considered the *current* degree of powerlessness of the recognized classes as setting the relevant baseline.[77]

The same point might be made about the Washington court's analysis of whether orientation is immutable. The court explained that because sexual orientation had not been established as an immutable characteristic[78] and because the immutability of the characteristic was still subject to debate,[79] the classification would not be treated as suspect. Yet, this would mean that religion could not be a suspect classification, since orientation is more difficult to change than one's religion.[80] So, too, it is easier to change one's

74. U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

75. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

76. *See supra* notes 67–68 and accompanying text (noting the Connecticut Supreme Court's comparing degrees of powerlessness).

77. *See In re* Marriage Cases, 183 P.3d 384, 443 (Cal. 2008) ("[I]f a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications."), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48 (Cal. 2009); *see also* United States v. Virginia, 518 U.S. 515, 575 (Scalia, J., dissenting) ("It is hard to consider women a 'discrete and insular minorit[y]' unable to employ the 'political processes ordinarily to be relied upon,' when they constitute a majority of the electorate." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))).

78. *Andersen*, 138 P.3d at 974.

79. *See id.* at 974 n.6.

80. *See* RICHARD A. POSNER, SEX AND REASON 296–97 (1992) (suggesting that it may be harder to change one's sexual orientation than one's religion).

alienage or illegitimacy status than one's orientation.[81] Basically, if the Washington court's approach were correct, some of the classifications currently recognized as suspect or quasi-suspect could not be so recognized.

While there is much to be said for the proposition that orientation should be treated as a suspect or quasi-suspect classification, a separate question is whether same-sex marriage bans already make use of a protected classification and thus should be examined with at least heightened scrutiny. Various courts have considered this claim, and there has been a surprising lack of consensus about how this issue should be resolved.

B. Classifications on the Basis of Sex

Several courts have addressed whether same-sex marriage bans classify on the basis of sex. Both their conclusions and their analyses have varied so greatly that one cannot help but conclude that there is no common understanding about how the equal protection guarantees are supposed to be applied. But if that is so, then there are important implications for equal protection analyses more generally and not only those involving LGBT plaintiffs.

1. Hawaii

More than fifteen years ago, the Hawaii Supreme Court in *Baehr v. Lewin*[82] analyzed that state's marriage statute, which included in relevant part that "the marriage contract, . . . shall be only between a man and a woman . . . ."[83] The court made two points: (1) "Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female,"[84] and (2) "the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex."[85]

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81. *Compare* Jonathan Weinberg, *The End of Citizenship?*, 107 MICH. L. REV. 931, 933 (2009) (book review) ("In order to become a U.S. citizen, one must first become a lawful permanent resident; once one becomes a lawful permanent resident, the road to citizenship is straightforward."), *and* J. R. Trahan, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 LA. L. REV. 661, 686–87 (1999) (discussing methods by which illegitimate children might be legitimated), *with* Kacy Elizabeth Wiggum, Note, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 357, 397–98 (2009). The American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers confirmed in an amicus brief in support of the petitioners in *Lawrence* that they consider sexual orientation an immutable characteristic, stating that it "is a normal variant of human sexual expression," that "is not a mental or psychological disorder," and is "highly resistant to change." Brief for Amici Curiae American Psychological Association et al in Support of Petitioners at 4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

82. 852 P.2d 44 (Haw. 1993).

83. HAW. REV. STAT. § 572-1 (2010).

84. *Baehr*, 852 P.2d at 60.

85. *Id.*

Basically, the Hawaii Supreme Court examined the express language of the statute and noted that the statute precluded males from marrying males and females from marrying females, but allowed males to marry females as long as no other limitations were violated (for example, the parties were old enough and were not too closely related by blood).[86] The court concluded that the statute facially classified on the basis of sex.[87]

A separate question was whether the classification was sufficiently closely tailored to support sufficiently important interests for such a classification to be upheld. That depended upon the level of scrutiny imposed by the state constitution for sex-based classifications—under the Hawaii Constitution, classifications on the basis of sex are examined with strict scrutiny.[88]

In his *Baehr* dissent, Judge Heen denied that the Hawaii statute classified on a forbidden basis, noting that "HRS § 572-1 treats everyone alike and applies equally to both sexes."[89] Yet, it is unclear whether he was asserting that the classification is not sex-based, because it allegedly affects the sexes equally,[90] or is sex-based but not invidiously,[91] because a statute might classify on the basis of sex, but nonetheless be permissible.[92]

Judge Heen noted, "A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has."[93] He then suggested that the statute should be examined in light of the rational basis

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86. *See* HAW. REV. STAT. § 572-1.

> In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:
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> (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is the result of the issue of parents married or not married to each other;
>
> (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2.

87. *Baehr*, 852 P.2d at 67.

88. *See id.* at 67 ("[S]ex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and . . . HRS § 572-1 is subject to the 'strict scrutiny' test.").

89. *Id.* at 71 (Heen, J., dissenting).

90. *See id.* at 72 ("HRS § 572-1 does not discriminate on the basis of gender.").

91. *See id.* at 71 (suggesting that the classification "does not effect an invidious discrimination").

92. *See, e.g.*, Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464 (1981) (upholding sex-based classification).

93. *Baehr*, 852 P.2d at 71 (Heen, J., dissenting).

test,[94] thereby implying that the statute did not classify on the basis of gender. Yet, the United States Supreme Court has already explained that this is not the proper way to analyze whether a statute classifies on a particular basis.

Consider *McLaughlin v. Florida*,[95] in which the Court examined Florida's making interracial fornication or adultery a separate crime in addition to the state's general prohibition of fornication and adultery.[96] The Court explained that the statute under which Dewey McLaughlin and Connie Hoffman[97] were charged could only apply to an interracial couple.[98] That said, however, the Court noted that "all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty."[99] Notwithstanding this equal application, the Court struck down the statute as a violation of equal protection guarantees.[100] The Court pointed out:

> Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.[101]

The *McLaughlin* Court explained that a racial classification was at issue,[102] equal application to whites and blacks notwithstanding. A separate

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94. *Id.* ("the issue is whether the statute rationally furthers a legitimate state interest").

95. 379 U.S. 184 (1964).

96. *See id.* at 185–86.

> Section 798.01 forbids living in adultery and section 798.02 proscribes lewd cohabitation. Both sections are of general application, both require proof of intercourse to sustain a conviction, and both authorize imprisonment for up to two years. Section 798.03 also of general application, proscribes fornication and authorizes a three-month jail sentence. The fourth section of the chapter, 798.04, makes criminal a white person and a Negro's living together in adultery or fornication. A one-year prison sentence is authorized. The conduct it reaches appears to be the same as is proscribed under the first two sections of the chapter. Section 798.05, the section at issue in this case, applies only to a white person and a Negro who habitually occupy the same room at nighttime.

Id.

97. *See* McLaughlin v. State, 153 So. 2d 1, 2 (Fla. 1963), *rev'd sub nom.* McLaughlin v. Florida, 379 U.S. 184 (1964) (suggesting that the defendants were Dewey McLaughlin and Connie Hoffman).

98. *McLaughlin*, 379 U.S. at 188 ("It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple.").

99. *Id.*

100. *See id.* at 187 ("We deal with the single issue of equal protection and on this basis set aside these convictions.").

101. *Id.* at 191.

102. *Id.* at 192 ("We deal here with a racial classification . . . .").

issue involved an analysis of the statute's constitutionality, which might include a variety of factors, including that a criminal statute was at issue[103] and that the classification triggered strict scrutiny.[104]

The same point about classification might be made in the civil context. In *Loving v. Virginia*,[105] the Court examined Virginia's anti-miscegenation statutes.[106] The Court struck down the statutes, including the statute that declared racial intermarriages void, concluding that they were "designed to maintain White Supremacy."[107] However, at least two points must be made. First, the *Loving* Court noted that the statutes would have been struck down even were that not the intent[108] and, second, there was no doubt that what was at issue were *racial* classifications.[109]

That the *Loving* Court struck down Virginia's marriage laws involving racial classifications does not establish that sex-based classifications must also be struck down. Whether sex-based classifications are constitutional depends upon the implicated interests of the state and the tightness of fit

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103. *See id.* (noting that the classification was "embodied in a criminal statute").

104. *See id.* at 192 ("[R]acial classifications [are] 'constitutionally suspect,' Bolling v. Sharpe, 347 U.S. 497, 499 [(1954)]; and subject to the 'most rigid scrutiny,' Korematsu v. United States, 323 U.S. 214, 216 [(1944)] . . . .").

105. 388 U.S. 1 (1967).

106. *Id.* at 4–5.

> The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:
>
> > "*Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."
>
> Section 20-59, which defines the penalty for miscegenation, provides:
>
> > "*Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."
>
> Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.

Id.

107. *Id.* at 11.

108. *See id.* at 11 n.11 ("[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races.").

109. *Id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

between the classification and the promotion of those interests.[110] While the federal standard used to determine whether sex-based classifications pass muster is not as demanding as the federal standard for determining the constitutionality of racial classifications, the former standard nonetheless requires that "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification."[111]

Judge Heen's analysis[112] was mistaken in at least two respects. First, one does not determine whether a statute *classifies* on a particular basis by looking at whether different groups are affected differently. As *McLaughlin* illustrates, a classification might result in an equal imposition of burdens across groups and nonetheless classify on a basis triggering closer scrutiny.[113]

A separate issue is whether the classification violates constitutional guarantees, and it *might* be important to see who is adversely affected when answering that question.[114] But that analysis does not involve determining the basis of the classification (that question has already been decided), but whether the standards used to determine whether the constitutional permissibility of such a classification have been met.

2. Vermont

In *Baker v. State*,[115] the Vermont Supreme Court found that the state's same-sex marriage ban violated state constitutional guarantees under a particular provision of the Vermont Constitution—the Common Benefits Clause.[116] The *Baker* court began its analysis by identifying the type of classification embodied in the statute.[117] The court recognized that the "marriage statutes apply expressly to opposite-sex couples . . . [and] exclude

110. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'" (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

111. *See id.* at 524 (citing *Miss. Univ. for Women*, 458 U.S. at 724).

112. Baehr v. Lewin, 852 P.2d 44, 70–74 (Haw. 1993) (Heen, J., dissenting); *see supra* text accompanying notes 89–94.

113. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

114. *But see supra* note 102 and accompanying text (suggesting that equal application would not save Florida's racial classification from being struck down as a violation of equal protection guarantees).

115. 744 A.2d 864 (Vt. 1999).

116. *Id.* at 867 ("We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."); *see also* VT. CONST. ch. 1, art. 7.

117. *Baker*, 744 A.2d at 880 ("The first step in our analysis is to identify the nature of the statutory classification.").

anyone who wishes to marry someone of the same sex."[118]

One might think that the court's recognition that the statute expressly excluded on the basis of sex or gender would be sufficient to establish that the statute classified on the basis of sex. However, surprisingly, the *Baker* court reasoned that "the marriage laws are *facially* neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."[119] Basically, the *Baker* court adopted Judge Heen's method of identifying the basis of classification, United States Supreme Court precedent to the contrary.[120] The *Baker* court failed to recognize that a statute not singling out a group for disparate treatment still might be using a classification triggering heightened scrutiny (for example, statutes that focus on the racial identity of the members of would-be marital couples). Ironically, the very case cited by the *Baker* court in support of its position,[121] *Personnel Administrator of Massachusetts v. Feeney*,[122] actually undermined the Vermont court's analysis.[123]

The *Feeney* Court examined a Massachusetts veterans' preference statute that "operate[d] overwhelmingly to the advantage of males."[124] The Court distinguished between two kinds of classifications—those that facially involve a protected classification and those that involve a neutral classification that might have a disparate impact on a protected class—and explained that certain classifications "in themselves supply a reason to infer antipathy,"[125] paradigmatically race.[126] Such a "classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[127] Here, the Court is suggesting that a statute expressly using a racial classification must be examined with strict scrutiny—it will not do to say, for example, that the racial classification is benign.[128] Even an allegedly non-invidiously motivated statute using a protected classification will be examined closely for fear that it is "motivated

118. *Id.*
119. *Id.* at 880 n.13 (emphasis added).
120. *See supra* notes 95–111 and accompanying text.
121. *See Baker*, 744 A.2d at 880 n.13.
122. 442 U.S. 256 (1979).
123. *See infra* notes 124–35 and accompanying text.
124. *Feeney*, 442 U.S. at 259.
125. *Id.* at 272.
126. *Id.*
127. *Id.*
128. *See* Johnson v. California, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications . . . .").

by an invidious purpose."[129]

Subjecting *express* racial classifications to strict scrutiny will not alone eradicate invidious discrimination, because individuals intent on invidiously discriminating might try to do so in a more subtle way. After all, laws classifying on allegedly neutral grounds might nonetheless target on the basis of race.[130] To prevent individuals from invidiously discriminating via an allegedly neutral classification, the Court will strictly scrutinize "a classification that is ostensibly neutral but is an obvious pretext."[131]

What would count as an ostensibly neutral classification? Here, the *Feeney* Court discussed a classification that involves a *non-race-related* term that allegedly was being used to target on the basis of race in a more subtle manner. The *Baker* court misunderstood how the term "neutral" was being used, mistakenly thinking that the *Feeney* Court was talking about a policy that was neutral in the sense that the races were affected equally. But that could not have been the *Feeney* Court's meaning, because the Court had just offered *McLaughlin* as an example of *facial* racial discrimination, and *McLaughlin* involved a racial classification that had been applied to the races equally.[132]

To understand what the *Feeney* Court was doing, it is helpful to consider the classification that was at issue. The challenged classification used the neutral term "veteran" that on its face was not associated with gender.[133] Indeed, the Court pointed out that there were both male and female veterans.[134]

Where a classification, neutral on its face, is challenged as offending equal protection guarantees, the Court uses a specific test to determine whether the neutral classification has been used to impose a burden on a protected class. The *Feeney* Court explained:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of [sic] overt, is not

129. *Id.* at 505.

130. *See* Alexander v. Sandoval, 532 U.S. 275, 306 n.13 (2001) (Stevens, J., dissenting) ("Many policies whose very intent is to discriminate are framed in a race-neutral manner.").

131. *Feeney*, 442 U.S. at 272.

132. *Id.*

133. *See id.* at 275 ("[T]he definition of 'veterans' in the statute has always been neutral as to gender . . . .").

134. *Id.* ("Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military . . . .").

> based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.[135]

Consider a statute that permits a man to marry a woman but not a man, and a woman to marry a man but not a woman. Suppose that a court for whatever reason reads such a statute as gender-neutral. The *Feeney* twofold inquiry tells the court to reconsider whether, in fact, the classification is gender-based. The question to be decided is *not* whether the genders are treated equally, but simply whether gender is the basis of the classification. Only if the classification is not gender-based should the next questions be considered.

Suppose that a neutral classification is nonetheless challenged as discriminatory on the basis of gender. Given that there is no gender-linked term in the statute, the only way that one could plausibly argue that the classification was in fact discriminatory on the basis of gender would be to show disparate impact. But, the *Feeney* Court suggests, *where there is no express classification*, one must show both disparate impact and intent to discriminate.[136]

Suppose that the *Baker* analysis were applied in *McLaughlin* and the Court had required a showing of disparate impact even when a facial racial classification was used. In that event, the Court would presumably have said that because whites and blacks were affected equally by the statute, rational basis scrutiny should be used. But this is exactly what *McLaughlin* did not say, since *McLaughlin* imposed strict scrutiny notwithstanding the equal application.[137]

In her concurring and dissenting *Baker* opinion, Justice Johnson pointed out that "an individual's right to marry a person of the same sex is prohibited solely on the basis of sex."[138] As she rightly suggested, once the gender-based classification was established, it was incumbent upon the state to establish that the statute was sufficiently "narrowly tailored to further important, if not compelling, interests."[139]

It is not claimed here that the *Baker* court was somehow blinded by its desire to avoid at all costs the conclusion that same-sex relationships should not be given legal recognition. On the contrary, the *Baker* court held that the Common Benefits Clause required that Vermont offer legal recognition to

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135. *Id.* at 274.

136. *See id.* at 273–74.

137. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

138. *See* Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting in part).

139. *See id.*

same-sex relationships, so the court's misapplication of *Feeney* cannot plausibly be attributed to that kind of result-oriented reasoning.[140] Nonetheless, the *Baker* court misapplied the relevant equal protection guarantees in a way that simply cannot account for the existing federal jurisprudence.

3. New York

The New York Court of Appeals addressed the constitutionality of that state's same-sex marriage ban in *Hernandez v. Robles*.[141] The court dismissed the equal protection argument in one paragraph, noting:

> The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex. This is not the kind of sham equality that the Supreme Court confronted in *Loving*; the statute there, prohibiting black and white people from marrying each other, was in substance anti-black legislation. Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.[142]

Yet, as the Court has repeatedly made clear, there is no requirement that one group be subordinated to another in order for a protected classification to be struck down.[143] Indeed, such a requirement flies in the face of the jurisprudence; certain classifications are presumptively prohibited because they are so rarely legitimate. To invalidate a statute that expressly uses a protected classification only if the statute can be shown to subordinate is to return to a jurisprudence explicitly repudiated in *McLaughlin*, where the *McLaughlin* Court explained that "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation."[144]

Not only did the New York court offer an interpretation of equal protection guarantees that hearkened back to the days of *Pace v. Alabama*, where the Court upheld Alabama's punishing interracial fornication more severely than intra-racial fornication,[145] but it also offered a very unusual

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140. *See id.* at 889.

141. 855 N.E.2d 1 (N.Y. 2006).

142. *Id.* at 10–11.

143. *See supra* notes 95–111 and accompanying text (discussing *Loving* and *McLaughlin*).

144. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

145. *See* Pace v. Alabama, 106 U.S. 583, 585 (1883), *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964).

> Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both

analysis of suspect and quasi-suspect jurisprudence more generally. The court considered whether orientation might be a suspect or quasi-suspect class under the New York Constitution.[146] The court suggested that it might "apply heightened scrutiny to sexual preference discrimination in some cases"[147] but would not when reviewing "legislation governing marriage and family relationships."[148]

Why are those areas excluded? Because the court decided that a "person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best."[149] Yet, evidence was presented to the court that children were thriving when raised by LGBT parents, which is to say that one's "preference" for sexual partners of the same sex was simply not correlated with one's ability to parent.[150] That evidence did not win the day because "the studies on their face do not establish *beyond doubt* that children fare equally well in same-sex and opposite-sex households."[151]

The New York court's analysis was startling in a number of respects. First, New York permits second-parent adoption, so two members of a same-sex couple might each be recognized as the legal parent of the same child.[152] This means that New York accepts that LGBT adults are good parents. However, the state has nonetheless decided that it will not permit same-sex parents raising a child together to marry, even though doing so would help those children[153] and would not in any way hurt the children who are being raised in different-sex families.[154]

> offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Id.

146. *Hernandez*, 855 N.E.2d at 20.

147. *Id.* at 11.

148. *Id.*

149. *Id.*

150. *Id.* at 7–8.

151. *Id.* at 8 (emphasis added).

152. *See In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

153. *See Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

> The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare . . . .

The New York court distinguished what was before it from the "kind of sham equality that the Supreme Court confronted in *Loving*."[155] Yet, the court failed to pay close enough attention to the issues raised in *Loving*.

Virginia supported its anti-miscegenation law by arguing that the state's "legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'"[156] The state was claiming that the children of interracial couples were inferior,[157] that children were better when produced by intra-racial couples than when produced by interracial couples. What proof did the state have that its contention was true? None. But the state argued that none was required because the races were being treated equally; that because equal protection guarantees were not offended by a statute that did not treat the races differently, mere rational basis scrutiny should be employed.[158] The *Loving* Court explained Virginia's position:

> The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.[159]

With respect to which judgment should the Court defer to the wisdom of the legislature? With respect to the claim that children would be better off if they were not produced by interracial couples. Apparently, if the New York court had been deciding *Loving*, and if the state could show that the statute was not promoting white supremacy (for example, because the state could somehow show that its interest was in maintaining the purity of all races and not just the white race), then the New York court would have decided the

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Id.

154. *Id.* at 30 ("while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest").

155. *Id.* at 11 (majority opinion).

156. Loving v. Virginia, 388 U.S. 1, 7 (1967).

157. *See* Naim v. Naim, 87 S.E.2d 749, 752 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

> It was said in that case that the question was one of difference between the races, not of superiority or inferiority, and that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures.

Id. (citing with approval State v. Gibson, 36 Ind. 389 (1871) (not reported in N.E.)).

158. *Loving*, 388 U.S. at 7–8.

159. *Id.* at 8.

case differently. After all, if the state could show that the interracial marriage ban was not "in substance anti-black legislation,"[160] then plaintiffs could not have claimed that the statute was designed to subordinate one race to another,[161] and rational basis would have appropriately been used. If rational basis scrutiny were used, then the court would presumably have deferred to the legislature's judgment about what was best for children because it could not be shown *beyond doubt* that the legislature was wrong. But this is a fundamental misunderstanding of *Loving*, where the Court made clear that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[162] The *Loving* Court was not saying that interracial marriage bans were only unconstitutional when involving an attempt to subordinate one race to another, but instead that they were unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races."[163]

In her masterful dissent, Chief Judge Kaye argued that the New York law violated equal protection guarantees because it discriminated both on the basis of gender and on the basis of orientation.[164] She explained, "That the statutory scheme applies equally to both sexes does not alter the conclusion that the classification here is based on sex."[165] Regrettably, the New York court simply chose to ignore that its approach had already been rejected in *Loving*.[166]

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160. *Hernandez*, 855 N.E.2d at 11.

161. *Cf. id.* ("Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class.").

162. *Loving*, 388 U.S. at 12.

163. *Id.* at 11 n.11.

164. *See Hernandez*, 855 N.E.2d at 27 (Kaye, C.J., dissenting).

> Homosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others." Accordingly, any classification discriminating on the basis of sexual orientation must be narrowly tailored to meet a compelling state interest.

Id. (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)) (citation omitted).

165. *Id.* at 29.

166. *See id.* ("The 'equal application' approach to equal protection analysis was expressly rejected by the Supreme Court in *Loving* . . . .").

4. Washington

The Washington Supreme Court offered an analysis much like that of the New York Court of Appeals, rejecting the equal protection argument in a cursory and conclusory fashion. The Washington court reasoned:

> If plaintiffs' case were truly analogous to *Loving,* we would first have to find that DOMA [the Washington statute banning same-sex marriage] discriminates on the basis of sex and then conclude that the right to marriage is violated because of the restriction due to sex discrimination. However, as the State urges, DOMA treats men and women the same."[167]

Yet, *Loving* did not establish that differential racial treatment had to be established before strict scrutiny would be employed for a racial classification. On the contrary, the very use of a racial classification triggered strict scrutiny, just as the very use of a racial classification in *McLaughlin* had triggered strict scrutiny, equal application to the races notwithstanding.[168] But that means that the Washington court should indeed have found that the statute classified on the basis of sex, thus triggering closer scrutiny. The court would then have decided whether the state same-sex marriage ban passed muster under this closer scrutiny.

Would the Washington court have struck down the statute when employing closer scrutiny? While such a result is not foreordained simply by virtue of the imposition of higher scrutiny, the court implied that it would indeed have felt compelled to strike down the statute,[169] perhaps because Washington subjects gender classifications to strict scrutiny.[170]

It could be that the Washington jurisprudence for determining whether a statute classifies on the basis of gender differs from the federal jurisprudence in a crucial way, for example, by requiring that classifications affect the sexes differently in order for higher scrutiny to be employed under state constitutional guarantees.[171] Even if that were so, however, the federal jurisprudence does not so require,[172] which means that the Washington statute should have been subjected to intermediate, if not strict, scrutiny.

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167. Andersen v. King Cnty., 138 P.3d 963, 989 (Wash. 2006); *see also* Conaway v. Deane, 932 A.2d 571, 598 (Md. 2007) ("Nor does the statute, facially or in its application, place men and women on an uneven playing field. Rather, the statute prohibits equally both men and women from the same conduct.").

168. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

169. *Andersen*, 138 P.3d at 989 (suggesting that in that case the court would "conclude that the right to marriage is violated because of the restriction due to sex discrimination").

170. *See* Darrin v. Gould, 540 P.2d 882, 888 (Wash. 1975) ("[W]e hold that the classification based upon sex . . . is inherently suspect and therefore must be subject to strict judicial scrutiny.").

171. *See Andersen*, 138 P.3d at 988 ("The purpose of the ERA 'is to end special treatment for or discrimination against *either sex.*'") (citing Marchioro v. Chaney, 582 P.2d 487, 491 (1978)).

172. *See supra* notes 124–39 and accompanying text.

5. California

In *In re Marriage Cases*,[173] the California Supreme Court understood that the California statute precluded a man from marrying a man but not a woman, and a woman from marrying a woman but not a man,[174] but reasoned that there was no discrimination because no one could marry someone of the same sex.[175] The court understood that the Virginia statute at issue in *Loving* permitted a white person to marry a white person and a black person to marry a black person, but it precluded a white person from marrying a black person.[176] However, the California court pointed out:

> [T]he antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in *Perez*) "the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians."[177]

Regrettably, there was no discussion of whether the Virginia statute would have been upheld had it been established that Virginia was trying to preserve the purity of all races. Such a question would not have undermined the California court's contention that Virginia's attempt to promote white supremacy violated constitutional guarantees—rather, it simply would have helped underscore that Virginia's statute was unconstitutional whether or not it was trying to promote white supremacy. But since that is so, *Loving* is not so easily distinguished because the state's attempt to promote racial supremacy was sufficient, but not necessary, to establish the unconstitutionality of the state's artificial restriction of marriage.

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173. 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

174. *Marriage Cases*, 183 P.3d at 436.

> Plaintiffs argue that because a woman who wishes to marry another woman would be permitted to do so if she were a man rather than a woman, and a man who wishes to marry another man would be permitted to do so if he were a woman rather than a man, the statutes must be seen as embodying discrimination on the basis of sex.

Id.

175. *Id.* ("In drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently. Persons of either gender are treated equally and are permitted to marry only a person of the opposite gender.").

176. *Id.* at 437.

177. *Id.* (quoting Perez v. Lippold, 198 P.2d 17, 23 (Cal. 1948)).

The California Supreme Court explained:

> [C]ourts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of the same race or of different races generally reflects a policy disapproving of the integration or close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of *racial discrimination* with respect to the interracial couple and both of its members.[178]

Yet, one would have thought from the court's previous analyses that treating interracial couples differently from intra-racial couples would involve racial discrimination only if there was some implicit or explicit attempt to privilege one race over another. Without any such showing, one still could claim that the statute was classifying on the basis of race but would need more before one could show disparate impact upon one race or another.

The California court contrasted the statute precluding interracial couples from marrying with one precluding same-sex couples from marrying by suggesting:

> [A] statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the *former* ground.[179]

Here, the court suggests that because there is no disparate impact on the basis of sex and there is such an impact on the basis of orientation, the statute should be examined in light of its discriminating on the basis of orientation *rather than* sex.[180] Certainly, the court was correct to recognize that such a statute would impose a burden on the LGBT community, but a separate question is whether such a statute should *in addition* be examined in light of its using a sex-based classification.

Consider a statute that precludes interracial marriage out of a desire to protect the integrity of all races. For purposes here, let us assume that the

178. *Marriage Cases*, 183 P.3d at 437.

179. *Id.*; *see also* Conaway v. Deane, 932 A.2d 571, 605 (Md. 2007) ("While Family Law § 2-201 does not draw a distinction based on sex, the legislation does differentiate implicitly on the basis of sexual preference.").

180. *See Marriage Cases*, 183 P.3d at 606.

statute is not designed to privilege one race over others and does not have the effect of privileging one race over others. While such a statute classifies on the basis of race, it *ex hypothesi* does not have a disparate racial impact. Yet, *Loving* teaches that such a statute should be examined with strict scrutiny even if it does not have a disparate racial impact and even if the purpose behind it is to promote racial integrity generally.[181] But if that is so, then the fact that the races are affected equally does not immunize a race-based classification from strict scrutiny. So, too, even if in fact a same-sex marriage ban affects the sexes equally, that should not immunize the statute from scrutiny for using a sex-based classification.

Ironically, the California court did not even have to reach the question of whether the state's same-sex marriage ban was classified on the basis of sex[182] because the court held that orientation was a suspect classification under the California Constitution.[183] One infers that the court wanted to choose the "correct" classification to subject to strict scrutiny, as if a classification could not discriminate on the basis of both sex and gender.[184]

A court believing that it had to choose the "correct" classification for constitutional review when considering a same-sex marriage challenge might be tempted to focus solely on the group on whom the burden has primarily, if not exclusively, been imposed, namely, the LGBT community. Yet, limiting one's focus to the intended target may well contradict the existing jurisprudence. For example, no court would suggest that a race-based or gender-based classification in a statute should be reviewed in light of the rational basis test as long as the statute was designed to impose a

181. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967).

182. For example, the Iowa Supreme court did not address whether that state's same-sex marriage ban offended equal protection guarantees on the basis of gender because the court found that orientation was protected under the state constitution. *See* Varnum v. Brien 763 N.W.2d 862, 896 (Iowa 2009) ("Accordingly, we hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.").

183. *See Marriage Cases*, 183 P.3d at 442 ("[S]exual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision."). By the same token, the Supreme Judicial Court of Massachusetts did not address whether that state's same-sex marriage ban should be examined with heightened scrutiny because it found that the ban could not even pass rational basis review. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("[W]e conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.").

184. *But see supra* note 164 and accompanying text (discussing Chief Judge Kaye's dissenting opinion in *Hernandez* in which she suggested that the New York same-sex marriage ban discriminated on the basis of both sex and gender).

burden on the poor.[185] So, too, a classification normally triggering closer scrutiny should not be subjected to more deferential review merely because the group intended to bear most of the burden has not yet been held to trigger more careful review.

One of the difficulties posed by an analysis requiring that disparate impact be shown before the level of scrutiny is raised is that the higher level of scrutiny is imposed to discover some of the non-obvious adverse effects of employing certain classifications. Consider, for example, the former admissions policy of the Mississippi University for Women (MUW), which precluded males from taking nursing courses for credit.[186] On its face, such a policy might seem to advantage rather than disadvantage women.[187] Yet, the *Mississippi University for Women* Court worried that MUW's "admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[188] The Court has made clear that when "determining the validity of a gender-based classification,"[189] the analysis "must be applied free of fixed notions concerning the roles and abilities of males and females."[190] Such an analysis cannot be properly performed if the Court is going to approach classifications based on gender with a deferential eye.

The Supreme Court has suggested, "'Inherent differences' between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for *artificial constraints on an individual's opportunity*."[191] At least one issue to be examined is whether same-sex marriage bans are based on stereotypical understandings of the roles of the men and women, either as parents[192] or as romantic partners.[193] But analysis

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185. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that poverty is not a suspect classification).

186. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720–21 (1982).

> Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program. Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit.

Id.

187. *Id.* at 727 ("The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action.").

188. *Id.* at 730.

189. *Id.* at 724.

190. *Id.* at 724–25.

191. United States v. Virginia, 518 U.S. 515, 533 (1996) (emphasis added).

192. *See supra* notes 149–54 and accompanying text (discussing the refusal by the New York Court of Appeals to give sufficient credit to the parenting abilities of LGBT parents, evidence supporting those abilities notwithstanding).

of whether particular classifications promote fixed notions about the proper roles of the sexes is much less likely to take place under rational basis review,[194] which is one of the reasons that closer scrutiny is employed for sex-based classifications.

IV. CONCLUSION

Same-sex marriage bans impose significant and undeserved burdens on LGBT families and should be struck down. Arguably, orientation should be treated as a suspect or quasi-suspect classification, because the class has the relevant indicia as much as or more than some of those classes already recognized.

A separate question, however, is whether same-sex marriage bans should trigger closer scrutiny because they are based on a protected classification. Those courts denying that such scrutiny should be employed have suggested that men must be treated differently from women in order for heightened scrutiny to be triggered. But the argument that express classifications applied equally do not trigger close scrutiny was rejected decades ago. Unless the United States Supreme Court makes clear that this is a fundamental misunderstanding of how equal protection guarantees work, it seems safe to assume that some courts will try to adopt this kind of approach in other cases.

To say that closer scrutiny should be employed when express sex-based classifications are employed is not to say that such classifications must be struck down. Rather it is merely to say that the state's burden is higher when it chooses to use a presumptively invalid classification.[195] As long as a state can offer "an 'exceedingly persuasive justification' for the classification,"[196] the same-sex marriage ban will pass muster, at least on federal grounds.

Express use of a protected classification triggers closer scrutiny, and any contrary holding will return us to an age when "separate but equal" will only result in deferential review. Presumably, no one would advocate returning to that bygone era, and it is nothing short of amazing that some courts,

193. *See* Linda C. McClain, *The "Male Problematic" and the Problems of Family Law: A Response to Don Browning's "Critical Familism,"* 56 EMORY L.J. 1407, 1410–11 (2007) (discussing the view that women are supposed to domesticate men).

194. *Cf.* Andersen v. King Cnty., 138 P.3d 963, 989 (Wash. 2006) ("[P]laintiffs fail to show that gay and lesbian persons are excluded from marriage on account of or in order to perpetuate gender stereotyping.").

195. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

196. United States v. Virginia, 518 U.S. at 524 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

whether upholding or striking down same-sex marriage bans, do not appreciate that their reasoning commits us to a return to a jurisprudence that has been repudiated for decades.